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No. 92-544

In the Supreme Court of the United States

October Term, 1992

Edward J. Petrus, Jr., M.D.
and
The Eye Center of Austin
Petitioners,

v.

Inspector General
Department of Health and Human Services
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the agency can retroactively apply a six-year statute of limitations for a Civil Monetary Penalty Law (CMPL) claim after the applicable five-year limit expired?

2. Whether a CMPL penalty after a criminal conviction and fine for the same conduct violates the Double Jeopardy Clause of the Fifth Amendment?

3. Whether the release of grand jury materials for use in a civil administrative hearing is a due process violation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

REASONS FOR GRANTING THE WRIT 1

I. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Supreme Court regarding retroactivity of Medicare statutes. 1

II. The Court of Appeals for the Fifth Circuit has affirmed an agency decision regarding the issue of double jeopardy for criminal and civil punishment for the same offense contrary to their prior decisions and in conflict with a decision of this Court. 6

III. The Court of Appeals affirmed an agency decision regarding the release of grand jury materials contrary to their prior decisions, and contrary to the applicable decisions of this Court. 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases — Page

Bernstein v. Sullivan,
914 F.2d 1395 (10th Cir. 1990) 6

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 6

Franklin v. New Mexico,
730 F.2d 86, 87 (10th Cir. 1984) 5

Gersman v. Group Health Ass'n, Inc.,
975 F.2d 886 (D.C. Cir. 1992) 5

Patterson v. McLean Credit Union,
784 F.Supp. 268, 273-74 (M.D.N.C. 1992) 5

United States v. Baggot,
463 U.S. 476 (1983) 11

United States v. Halper,
490 U.S. 435 (1989) 9

United States v. Sanchez-Escareno,
950 F.2d 193 (5th Cir. 1991),
cert. denied, 113 S.Ct. 123 (1992) 9

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Pursuant to Supreme Court Rule 15.6, this reply brief is presented.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals for the Fifth Circuit has rendered a decision in conflict with the Supreme Court regarding retroactivity of Medicare statutes.

At page 8 of its response, the government states that this Court lacks jurisdiction to entertain Petitioner Eye Center's claims. On page 2, in the text accompanying footnote 1 of the government's response, reference is made to the untimeliness of the petition by the Eye Center. It is clear from the Appellate

Court's final judgment filed June 3, 1992, and the denial of the rehearing en banc filed on July 1, 1992, which affirmed any prior decisions, that the order dismissing the Eye Center is incorporated in that judgment and thus the appeal to this Court is timely.

The only issue of jurisdiction is the validity of the judgment rendered against the Eye Center without the government ever serving notice on the corporation. The Secretary of State for the State of Texas certified that no service was made on the corporation. See App. Br. App. Ex. A-1. The June 7, 1989, letter from the agency to impose a penalty and assessment, which the government conceded is required under the CMPL (Res. Br. p.4), was only served on Petrus. See App. Br., App. Ex. A-2. No service was obtained on the Eye Center as claimed by the government on page 4 of their response. The request for a hearing was made solely by Petrus. See App. Br. App. Ex. A-3. The docketing notice from the agency of August 17, 1989, was only addressed and served on Petrus. See App. Br. App. Ex. A-4. The agency decision should be vacated because the agency lacked jurisdiction to proceed due to their failure to serve all parties.

At page 7 of its response, the government questions whether the owners of the corporation's assets may prosecute or defend actions against the corporation in courts as may be necessary to protect their property rights. The State of Texas says yes. By dismissing the Eye Center, the Court of Appeals for the Fifth Circuit violated the due process clause of the Fourteenth Amendment, by denying a citizen a privilege which the state had clearly told him was available to him.

At page 9 of its response, the government asserts that Section 15 of the MMPPPA, which amended the effective date of the new statute of limitations, applies to administrative proceedings commenced after September 1, 1987. However, the actual wording of the statutory amendment:

> the amendments made by the Act shall become effective at the end of the fourteen-day period...

clearly establishes that the start of the six-year statute of limitations is for claims filed after that date.

In a recent decision, **Gersman v. Group Health Ass'n, Inc.**, 975 F.2d 886 (D.C. Cir. 1992), the court considered whether a subsection to an Act applies retroactively for conduct occurring prior to its enactment. The court held that:

> It is the general rule that substantive statutory amendments do not apply to pre-amendment conduct. This holding is consistent with **Bradley**[1] and **Thorpe**[2], which dealt with remedial and procedural amendments. The present case concerns a substantive amendment and pre-amendment conduct. The rights of the parties must be adjudicated as they were under the law prevailing at the time of the conduct.

Gersman, 975 F.2d at 900.

The **Gersman** court also discussed the "take effect upon enactment" language. If applied to this statute it would indicate that September 1, 1987, is a beginning point from which date the Act and its amendments would be operative, but having no effect on events occurring before that date, and cited **Patterson v. McLean Credit Union**, 784 F.Supp. 268, 273-74 (M.D.N.C. 1992). Accord **Franklin v. New Mexico**, 730 F.2d 86, 87 (10th Cir. 1984)(statutory language that "amendments made by this section shall become effective on the date of the [statute's] enactment ... indicate[s] an intent for prospective application of the amendment.").
Gersman, 975 F.2d at 889.

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[1]**Bradley v. School Board**, 416 U.S. 696 (1974).

[2]**Thorpe v. Housing Authority of Durham**, 393 U.S. 268 (1969).

At page 9, in the text accompanying footnote 4, the government cited **Bernstein v. Sullivan,**[3] as supporting a retroactive statute of limitations. That case is distinguished as the court noted that:

> Because the five-year period was about to expire, the Inspector sought, and secured, from Dr. Bernstein an agreement dated March 31, 1987, which tolled the running of the five-year statute of limitations.

Bernstein, 914 F.2d at 1398.

and that:

> Thereafter, the parties agreed to stipulated facts and waived a hearing. Both parties agreed that the Administrative Law judge could enter judgment against Dr. Bernstein ...

Bernstein, 914 F.2d at 1399.

In the instant case, there was no tolling of the five-year statute of limitations or stipulation to any facts. Any retroactive application of the statutes is contrary to the prospective interpretation of **Gersman**, which is founded in **Bowen.**[4]

At page 3 of the government's response, the government described a violation of 42 U.S.C. § 1320a-7a(a)(1)(A) as a claim for an item or service that the person "knows or should know was

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[3]914 F.2d 1395 (10th Cir. 1990).

[4]**Bowen v. Georgetown University Hospital**, 488 U.S. 204 (1988).

not provided as claimed."[5] The government alleges 174 claims were not provided as claimed (Res. Br. p.4). It is mandatory that the government, in proposing a violation of the CMPL under § 1320a-7a(a)(1)(a) prove that the item or service was not provided to the patient. The CMPL, § 1320a-7a(i) defines "item or service:

> The term "item or service" includes (A) any particular item, device, medical supply, or service **claimed to have been provided to a patient** and listed in an itemized claim for payments. (emphasis added).

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[5]The government admitted that they substituted the "knows or has reason to know" provision for "knows or should know." (Pet. App. B33, n.22). This substantive amendment changed the status of liability under the CMPL. The CMPL requires as a condition of imposing liability on the principal that the principal himself possess the requisite knowledge. The term "reason to know" is defined in the *Restatement (Second) of Torts* § 12 (1965) and *Restatement (Second) of Agency* § 9 (1957) to mean that an actor actually has information from which a person of reasonable intelligence would infer that the fact in question exists. The term "reason to know" implies that the actor is under no duty to ascertain that information. **Burgess v. Montgomery Ward and Co.**, 498 F.2d 495, 498 (10th Cir. 1959). The duty to investigate further arises only after the actor actually learns of the pertinent information. The information gathered by Ms. Motes, an agent for the IG, was never shared with the Petitioners, so they were never informed of any noted deficiencies. The clear language of the CMPL expressly precludes the application of the doctrine of vicarious liability, and the imposition of damages - compensatory or exemplary. **Inspector General v. Frank P. Silver, M.D.**, No C-19, (1988).

The terms "not provided"[6] refers **only** to the item or service, and must be defined in the ordinary meaning as **not furnished or supplied.**[7] Any enlargement of the interpretation of "not provided as claimed" by the government is without foundation and contrary to the definition provided by the statute. The Inspector General in their brief stated: "[t]here was no evidence at the trial which suggested that Respondents billed for any services that were not in fact provided." (IG Br. p.96). The government has no standing to maintain a claim for a violation of § 1320a-7a(a)(1)(A) of the CMPL.

At page 3 of the government's response, they described a violation of 42 U.S.C. § 1320a-7a(a)(1)(D) as a claim for an item or service performed by a physician during a period in which he is excluded from participation in the Medicare and Medicaid programs. The government alleges 271 improper claims by the Eye Center (Res. Br. p.4) in violation of § 1320a-7a(a)(1)(D). All the claims were submitted by the Eye Center, a viable corporation in the State of Texas, which was never suspended from Medicare or Medicaid, therefore the government's claim is unfounded.

II. The Court of Appeals for the Fifth Circuit has affirmed an agency decision regarding the issue of double jeopardy for criminal and civil punishment for the same offense contrary to their prior decisions and in conflict with a decision of this Court.

At page 11 of its response, the government asserts that while Petrus had previously been convicted, neither petitioner was criminally prosecuted for 265 of the 271 items at issue, and that no double jeopardy could arise. However, the government failed

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[6]A search of Westlaw did not disclose any federal or state cases that provided a definition of these terms.

[7]Webster's New World Dictionary, p.1144, 2nd Ed, 1974.

to mention that the plea agreement signed on May 2, 1985, discharged both Petrus and the Eye Center from all claims between May 12, 1983 and May 2, 1985. The judge during sentencing also took into account all the alleged claims, which included the 265 claims noted by the government.

At page 11, in the text accompanying footnote 5 of the government's response, the government alleges that **Halper**[8] does not require an accounting of any losses. The Court however held that:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then **the defendant is entitled to an accounting of the Government's damages and costs** to determine if the penalty sought in fact constitutes a second punishment. (emphasis added).

Halper, 109 S.Ct. at 1902.

The **Halper** decision maintained that CMPL damages are limited to the amount of fraud itself, and the ancillary costs, such as the costs of detection and investigation. The government admitted that all the items or services claimed were provided (IG Br. p.96) thus voiding any actual damages. The government also refused to document any costs of detection and investigation in the discovery request. Therefore, any penalty constitutes double jeopardy under **Halper**.

In the same footnote, the government claimed that **United States v. Sanchez-Escareno**, 950 F.2d 193 (5th Cir. 1991), *cert.*

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[8]**United States v. Halper**, 490 U.S. 435 (1989).

denied, 113 S.Ct. 123 (1992) does not apply to this case. While **Sanchez-Escareno** involves the execution of a note promising to pay civil fines, an extensive discussion of the rationale underlying the double jeopardy principles expressed in **Halper** is detailed, upheld by the Fifth Circuit, and supportive of the petitioners position.

At page 6 of the governments response, the government created a formula and arrived at an amount they allege bore a "reasonable relationship" to the government's loss of approximately $1,425, and attribute this calculation proper under **Halper**. As noted previously, the government never proved any loss under the CMPL, and the government's novel formula is unfounded.

III. The Court of Appeals affirmed an agency decision regarding the release of grand jury materials contrary to their prior decisions, and contrary to the applicable decisions of this Court.

At page 13 of the government's response, the government alleges that the grand jury materials used by the Inspector General were "duplicative" of their evidence. Such a claim by the government is contrary to the "Ex parte application to disclose grand jury proceedings" filed February 9, 1990. In their motion the government stated that the records and business records of the petitioners "no longer exist other than those now in the grand jury records." One must question the veracity of the government's reply.

The introduction of grand jury materials in an administrative hearing violated Rule 6, and tainted the proceeding. At page 12 of the government's response, the government mischaracterized the CMPL hearing as adjudicative, when in fact the hearing is solely to determine the amount of penalty and assessments. By their own regulations, the ALJ does not have the authority to make decisions regarding the federal statutes or regulations. 42 CFR, Ch. V, § 1003.115(c). The ALJ is not conducting litigation, or preparing to conduct litigation, but conducting an administra-

tive hearing to determine the amount of penalty. The government conceded that **Baggot**[9] held that the disclosure of grand jury materials is not authorized by Rule 6(e)(3)(C)(i) for use in conducting a civil investigation to determine liability and to assess any deficiency. The CMPL hearing was investigative, since it used the hearing to determine any aggravating or mitigating facts in determining the amount of penalty to be administered.

CONCLUSION

The government's response is devoid of merit. The matters raised in this case have a significant impact on physicians and health care providers who participate in the Medicare and Medicaid programs, and therefore needs to be addressed by this Honorable Court. Therefore the petition for writ of certiorari should be granted.

Respectfully submitted,

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[9]**United States v. Baggot**, 463 U.S. 476 (1983).